Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

Cooperativa Multiactiva de Empleados de Distribuidores de Drogas, et al.,

Petitioners,

v.

R. Richard Newcomb, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLOMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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57 pp

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER NONRESIDENT ALIENS WITHOUT ANY CONNECTIONS TO THE UNITED STATES HAVE STANDING TO CHALLENGE THE OFFICE OF FOREIGN ASSETS CONTROL'S ISSUANCE OF AN ALLEGED BILL OF PAINS AND PENALTY IN VIOLATION OF THE PROHIBITION OF ARTICLE I, SECTION 9, CLAUSE 3 OF THE CONSTITUTION,?

II. WHETHER PROHIBITION OF ARTICLE I, SECTION 9, CLAUSE 3, APPLIES TO THE ACTIONS OF THE OFFICE OF FOREIGN ASSETS CONTROL ACTING UNDER DELEGATED AUTHORITY FROM CONGRESS?

III. WHETHER THE OFFICE OF FOREIGN ASSETS CONTROL'S NOTICE OF BLOCKING IS A BILL OF PAINS AND PENALTIES?

IV. WHETHER THE OFFICE OF FOREIGN ASSETS CONTROL HAS "INHERENT AUTHORITY" TO ACT IN VIOLATION OF EITHER THE RESTRICTION IN 50 U.S.C. §1701(B), OR THE REQUIREMENTS OF 21 U.S.C. §881(a)(6), OR THE PROHIBITION AGAINST BILLS OF PAINS AND PENALTY?

LIST OF PARTIES

Petitioners include the four thousand member owners/employees nonresident alien credit union, Cooperativa Multiactiva de Empleados de Distribuidores de Drogas; as well as its Board of Director Members: Messrs. Julio Cesar Munoz Cortes, Nohora Paredes Gonzalez, Ricardo Javier Diaz Fajardo, Miguel Esteban Pineros Leon, and Jose Tiberio Fernandez Luma ("COPSERVIR").

Respondents are Mr. R. Richard Newcomb, Director of the Office of Foreign Assets Control, and Mr. Richard Rubin, Secretary of the Department of Treasury.

Pursuant to Rule 29.6, the undersigned counsel states that COPSERVIR is a nonresident alien "trade association," organized under the laws of the Republic of Colombia, and doing business only in the Republic of Colombia; and has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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CITATIONS TO OPINIONS BELOW

The Judgement of the United States Court of Appeal for the District of Colombia Circuit No. 99-5190 is unpublished, but is reproduced in the appendix to this petition at A-3.

The Order and Memorandum of the United States District Court, No. 98CV 0949 (LFO), is unreported, but is reproduced in the appendix to this petition at A-5.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the District of Colombia Circuit was entered on March 6, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 8 Cl. 3, provide:

[Congress shall have the Power] To regulate Commerce....

Article I, § 9 Cl. 3, provide:

No Bill of Attainder or *ex post facto* Law shall be passed.

50 U.S.C. § 1701 . . . . . (See A-1)

50 U.S.C. § 1705 . . . . . (See A-1)

21 U.S.C. Sec. 881(a)(6) . . (See A-2)

STATEMENT OF THE CASE

A. JURISDICTION BELOW

The District Court's jurisdiction was based on 28 U.S.C. §§ 1331 and 1355. Appellate jurisdiction was invoked pursuant to 28 U.S.C. § 1291.

B. RELEVANT FACTS

In 1997, the Office of Foreign Assets Control ("OFAC"), under delegated authority from Congress, issued a Notice of Blocking against COPSERVIR because of its purchase of Drogas La Rebaja, a Colombian pharmaceutical retail chain, already listed on an OFAC Notice of Blocking dated October 24, 1995.

Without any jury trial, which would have been required under 21 U.S.C. §881(a)(6), the Notice of Blocking labeled COPSERVIR as a Specially Designated Narcotics Traffickers or SDNTs, blocked and seized all property and interests in property in the United States, and prohibiting any and all transactions or dealings with COPSERVIR by anyone in the United States and worldwide.

Due to the stigma of the label of SDNTs, and the active threats by the

United States to any business which might do business with COPSERVIR, they have been denied the right to their property to contract and employment, as well as to conduct their business, i.e. they cannot obtain life/medical insurance; they cannot travel internationally; they cannot have bank checking or savings accounts; they cannot purchase compulsory auto insurance, and thus cannot own a car in their name; they cannot obtain credit cards; they cannot participate in the stock market; and they cannot acquire and transfer property.

The Complaint sought judicial review of, and a declaratory judgement voiding the Notice of Blocking for the violation of the Constitutional prohibition against the issuance of Bill of Pains and Penalty, and for failure to comply with the restrictions of 50 U.S. C. §1701(b) and §1705, and the requirements 21 U.S.C. §881(a)(6).

After oral argument on the Government's motion for Summary Judgement, the District Court held that although the Notice of Blocking did specifically identify COPSERVIR as an SDNT, it found that the OFAC's Notice was not a "Bill of Attainder," since it did not impose punishment traditionally judged to be prohibited, and there was a non-punitive legislative purpose to the Notice. Furthermore, the Court held that the

Government did not need to comply with federal forfeiture law when issuing a Notice of Blocking. The District Court did not consider alleged violations of 50 U.S.C. §1701(b) and §1705.

The Court of Appeals affirmed, holding that "foreign nationals and entities without any connection to the United States... lack standing to bring a challenge under Article I, Section 9, clause 3 of the Constitution of the United States." Finally, the Court of Appeals assumed away both the arguments and evidence that the Government violated 21 U.S.C. § 881 or 50 U.S.C. §§ 1701 & 1705 (A-3).

REASONS FOR GRANTING THE WRIT

I THE COURT OF APPEALS' HOLDING THAT A NONRESIDENT ALIEN, WITHOUT PROPERTY IN THE UNITED STATES, HAS NO STANDING TO SEEK THE PROTECTION OF ART. I, SEC.9, CL 3, OF THE CONSTITUTION HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN THE *INSULAR CASES*.

The initial question presented to the Courts below, and in this Petition, does not involve the question of what, if any, protections are given to nonresident aliens under the Bill of Rights,

but rather the protections given to all people, including nonresident aliens, pursuant to the **limitations and prohibitions** in Article I, §9, Cl.3, of the Constitution.

The undersign Counsel for COPSERVIR underscored this during oral argument, when he stated that "...the attack on the actions of OFAC essentially [and] basically is under the constitution, not under the amendments." (Trans page 83, line 24). ". . .We're not saying the Bill of Rights applies. We are saying there is a fundamental violation of rights under the Constitution." (Trans. Page 85, line 23).

The judgement of the Court of Appeals for the District of Colombia, holding that nonresident aliens have no standing to bring a challenge under the Constitution, and specifically under the **prohibitions** in Article I, §9, Cl.3, is in direct conflict with this Court's decisions in *United States v. Verdugo-Urquidez*, 494 U.S. 259 at 268, 271, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990), and as discussed below the group of cases commonly referred to as the *INSULAR CASES* (A term given to a group of cases dealing with the former island territories of the United States, e.g. Hawaii, Puerto Rico and the Phillippines).

Beginning in *McCulloch v Maryland*, 4 Wheat 316, at 421, 4 L. Ed.579 (1819), this Court stated,

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adopted to that end, **which are not prohibited**, but consistent with the letter and spirit of the constitution, are constitutional. (Emphasis added)

In this context, in *Verdugo-Urquidez*, 494 U.S. at 276-277, Justice Kennedy, made this significant observation in his concurring opinion,

> ...Though it must be beyond dispute that persons outside the United States did not assent to the Constitution, **that is quite irrelevant to any construction of the powers conferred or the limitations imposed by it**....I take it to be correct, as the plurality opinion in *Reid v. Covert* sets forth, that the Government may act only as the Constitution authorizes, **whether the actions in question are foreign or domestic.** (Emphasis added)

These limitation on the power of Congress or the Executive Branch to legislate or issue "rules of law" con-

trary to the **prohibition** in Article I, §9, cl. 3, is logically consistent with the very structure of our limited Constitutional system.

In short, the United States Government is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. *Reid v. Covert*, 354 U.S. 1 at 5-6, 77 S.Ct. 2222 (1957); *see also* footnote 7, *United States v. Morrison*, S.Ct. 99-5, Decided May 15, 2000.

"One grand theme runs through all three centuries of American constitutional history. It is the idea of limited government...." (Emphasis added) A.H. Kelly & W.A. Harbison, The American Constitution; Its Origins and Development 6 (4th ed. 1970).

The **prohibition** of Article I, §9, Cl. 3, of the Constitution, providing that no bill of attainder shall be passed was not intended as some narrow, technical **prohibitions**, but rather as an implementation of the separation of powers doctrine, as a general safeguard against legislative exercise of the judicial function, *U.S. v. Brown*, 85 S.Ct. 1707 at 1711, 1712, 381 U.S. 437, 14 L.Ed.2d 484 (1965).

A Bill of Pains and Penalties is a Bill of Attainder imposing punishment less than death. Such bills are within the constitutional prohibitions against Bills of Attainder. Both are legislative acts which inflicts punishment without judicial trial. *Nixon v. Administrator of General Services*, 408 F.Supp 321 at 371 (DC 1976, aff'd 97 S.Ct. 2777, 433 U.S. 425, 53 L.Ed.2d 867(1977)

In the *Insular Cases*, this Court confirmed that our limited Constitutional system apply to all persons, since the **prohibitions** in Art. I, Sec. 9, Cl. 3, limits the very power of Congress, and by extension Executive Branch act.

In *Downs v. Bidwell*, 182 U.S. 244, 21 S.Ct. 770 at 783, 45 L.Ed. 1058 (1901), this Court stated,

> . . .**There is a clear distinction between such prohibitions as go to the very root of the power of congress to act at all, irrespective of time or place**, and such as are operative only 'throughout the United States' or among the several states.
>
> Thus, when the Constitution declares that 'no bill of attainder...law shall be passed,'... **it goes to the competency of Congress**

to pass a bill of that description." (Emphasis added)

Subsequently, in *Dorr v. United States*, 195 U.S. 138, 24 S.Ct.808 at 810 (1904), the Supreme Court reconfirmed the limitation on the power of Congress to legislate contrary to the **prohibitions**,

> ...[W]hat are the limits of that power?
>
> To this [we] answer that, in common with all the other legislative powers of Congress, **it finds limits in the express prohibitions on Congress not to do certain things**; that, in the exercise of the legislative power, Congress cannot pass *ex post facto* law or bill of attainder; and so in respect to each of the other prohibitions contained in the Constitution.'

Furthermore, regarding the actions of the United States outside of its boundaries or territories this Court has held that,

> ....[T]here may be a distinction between certain natural rights enforced in the Constitution by **prohibitions** against interference with them, and what may be termed artificial rights which are pecu-

liar to our own system of justice. Of the former class are the right . . . ; **to personal liberty and individual property; . . . ; to free access to courts of justice, to due process of law, and to an equal protection of the laws; . . . ; and to such other immunities as are indispensable to a free government.** Of the latter class are the rights to citizenship, to suffrage (citation omitted), and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence,.... **Even if regarded as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty, and property.** (Emphasis added) *Downs v. Bidwell*, 21 S.Ct. at 785 (1901). *See also, Hawaii v. Mankichi*, 23 S.Ct. 787 at 791(1902).

More recently in *Gutierrez de Martinez v. Lamagno*, 115 S.Ct. 2227 at 2233-2234; 132 L.Ed.2d 375 (1995)[involving a 1991 car accident in the Republic of Colombia resulting in serious physical and property damage to a nonresident alien with no connection to the United States, cause by an allegedly drunk womanizing Drug Enforcement Agency employee], this Court held that their must be judicial review of the "scope of employment" certification of the Attorney General, since to bar review would cause the

foreign person to be denied the fundamental right to an impartial fair proceeding.

> ...[T]he proposed reading would cast Article III judges in the role of petty functionaries, persons required to enter as a court judgement an executive officer's decision, but stripped of the capacity to evaluate independently whether the executive decision is correct . . . This strange course becomes all the more surreal when one adds to the scene the absence of an obligation on the part of the Attorney General's delegate to conduct a fair proceeding, indeed any proceeding. She need not give the plaintiff an opportunity to speak to the "scope" question, or even notice that she is considering the question. Nor need she give any explanation of her action.

Similarly, the Courts have rejected the Government's repeated attempts to deny due process and equal protection of the laws to a nonresident alien with no connection to the United States, See *Friko Corporation and Johnny Daccarett, alleged alter ego of Friko Corp. vs. Commissioner of Internal Revenue*, 26 F.3d 1139 (D.C. 1994); See also, *Jose Antonio Ortega-Rodriguez, Petitioner v. United States*, 113 S.Ct. 1199 (1993).

Consequently, based the limited nature of powers granted Congress under the Constitution, nonresident aliens without any connection with the United States, have standing to seek protections in the **prohibitions** in the Constitution.

II THE COURT MUST EXERCISE ITS SUPERVISORY POWER TO RESOLVE THE CONFLICT AMONG THE CIRCUITS REGARDING THE APPLICATIONS OF THE PROHIBITIONS IN THE CONSTITUTION VIS-A-VIS THE ACTIONS OF EXECUTIVE BRANCH ACTING UNDER DELEGATED AUTHORITY FROM CONGRESS

The Constitution is the only source of power authorizing action by any branch of the Federal government. *Dorr*, 24 S.Ct. at 809.

Pursuant Art. 1, § 8, Cl. 3 of the Constitution, the power to regulate international commerce is vested exclusively in Congress.

> "...(citation omitted) like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and **acknowledges no limitation other than prescribed by the Constitution**. . . ." *Downs v.Bidwell*, 21 S.Ct. at 784.

On a similar point, this Court recently stated that, "[u]nder our written Constitution... the limitations of congressional authority is not solely a matter of legislative grace." *United States v. Morrison*, No. 99-5 at 14 (May 15, 2000)

Consistent with this, Courts have held that when Congress delegates its authority to the Executive Branch, the **prohibitions** in Article I §8, Cl. 3 of the Constitution apply. "What Congress cannot do directly, it cannot do by delegation." *Rodriguez v. United States Parole Com'n*, 594 F.2d 170 at 173 (7th Cir. 1979); *Prater v. U.S. Parole Com'n*, 802 F.2d 948 at 952(7th 1986); *United States Ex Rel. Foreman v. McCall*, 709 F.2d 852 at 859 (3rd Cir. 1983); *Walmer v. U.S. Dept. of Defense*, 52 F3d 851 at 855 (10th Cir. 1995); Davis, *Administrative Law of the Seventies* § 5.03 at 147 (1976).

In *Dehainaut v. Pena*, 32 F.3rd 1066 at 1071 (7th Cir. 1994), the Seventh Circuit, referring to its holding in *Rodriguez*, 594 F.2d 170 at 174, stated,

> that an administrative rule adopted pursuant to Congressionally delegated authority must be viewed as tantamount to a statute for purposes of determining whether it runs afoul of the *ex post facto* clause, a constitutional provision

that, like the ban on bills of attainder, protects settled expectations against subsequent shifts on political winds. Having gone this far, it is a conceivable step to also view agency policy interpreting the language of a presidential directive issued pursuant to statutory authority,. . ., as the functional equivalent of a legislative enactment for bill of attainder purposes.. . . (emphasis added)

In summary, when Congress has delegated to the Executive Branch authority to act under the Commerce Clause, instead of acting itself, the resulting Executive Branch action, is an extension of a Congressional act, and must comply with Constitutional prohibitions.

Therefore, the decision of the Court of Appeals for the District of Colombia is in conflict with the 3rd, 7th and 10th Circuits.

III OFAC'S NOTICE OF BLOCKING LABEL COPSERVIR WITH THE STIGMA OF SDNTS AND THEREBY IMPOSE THE TRADITIONAL PROHIBITED BILLS OF PAINS AND PENALTIES PUNISHMENT.

The Court of Appeals for the District of Colombia has held that the **prohibition** of a Bill of Pains and Penalty is triggered if the "legislative act meets two tests-first, that it ap

plies with specificity, and second that it impose punishment." *BELL-SOUTH CORP. v. FCC*, 144 F.3rd 58 at 62 (D.C. Cir. 1998).

1. As to the first test, "specificity," the District Court found that the Blocking Notice specifically identify COPSERVIR and its Board of Directors as SDNTs.

This should be enough to trigger the **prohibition**, because they are stigmatized worldwide by being labeled with the badge of infamy of SDNTs, without a judicial trial, much less the jury trial, which would be requested under 21 U.S.C. §881(a)(6).

This Court has held that laws imposing civil disabilities, such as the penalty of "infamy" or being "stigmatized," without judicial trial, is punishment and a **prohibited** bill of attainder, *U.S. v. Lovett*, 66 S.Ct. 1073 at 1078, 328 U.S. 303, 90 L.Ed. 1252 (1946); *United States Ex Rel. Martin v. Strasburg*, 513 F.Supp 691 at 715 and 716 (1981).

It is obvious the stigma attached to being labeled an SDNTs is punishment.

2. In addition to the above, we turn to the second test, the three distinct punishment inquiries formalized by

the Court in *BELLSOUTH CORP.* 144 F.3d at 64, which also are present.

i. "Corruption of Blood"

Under common law there did exist forfeiture based on the conviction of a felony or of treason. Such forfeiture was known as forfeiture of estate state or corruption of blood.

The Courts have held that this sanction, which is the bar on an individual's receiving or transmitting property constitutes punishment, and is prohibited by the Constitution. *Bellsouth*, 144 F.3d at 64; *Ex part Garland*, 71 U.S. 333, 18 L.Ed. 366 (1867).

As stated in the Complaint, and in the Administrative Record, the only reason that COPSERVIR is listed as SDNTs, is because of their purchase of Drogas La Rebaja, from the children and family of the Rodriguez Orjuela Brothers.

By imposing sanctions without the use of 50 U.S.C. §1705, OFAC is undertaking a forfeiture, through the use of the badge of infamy of SDNTs. By causing the "Civil Death" of the children and family of the Rodriguez Orjuela Bothers, and anyone who has commercial dealings with them, OFAC makes an "end run" around the protections under 21 U.S.C. §881(a)(6).

ii. Deprivation of the Property to Right to Contract or to Employment

> ....**Even if regarded as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty, and property.**" (Emphasis added) *Downs v. Bidwell*, 21 S.Ct. at 785.

As the Administrative Record shows, and as alleged in the Complaint, the SDNTs badge of infamy has deprived COPSERVIR and its Board of Director's of their right to there property right of being able to conduct their business and to employment, by prohibiting them the right to buy goods, and by deny them the right to use the service of financial institutions worldwide, etc.

OFAC's SDNTs label is "punishment," under all of the elements this Court defined in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 at 168-169, 83 S.Ct 554, 9 L.Ed2d 644 (1963). It stigmatize the reputations, and does impair their right to earn a living. This clearly punishes the individuals without a judicial trial, which is forbidden by the Constitution. *Lovett*, 66 S.Ct. at 1078.

iii. OFAC's Notice of Blocking serves only a punitive legislative purpose.

The entire Record confirms that OFAC's Notice of Blocking was issued as a direct result of the judicial decisions of the Colombian Courts in 1994, finding that the Drogas La Rebaja were not subject to forfeiture. This fact, plus all the above facts presented, make a clear record of an intent to punish.

OFAC's Notice of Blocking viewed in terms of the type and severity of burden imposed, further only some punitive purposes.

The Courts in reviewing challenges Executive Branch actions, have held that the Executive Branch must comply with the guidelines Congress enacted in legislation, *Youngstown Sheet & Tube Co. v Sawyer*, 343 U.S. 614 at 637-38, 72 S.Ct. 863 (1952).

However, instead of complying with the 21 U.S.C. §881(a)(6), or OFAC's authority under 50 U.S.C. §1705, to impose the penalty for violating the original Order, OFAC "stigmatized" COPSERVIR as an SDNTs. In effect OFAC invented a new "national emergency." All of these action served only a punitive motive.

IV OFAC HAS NO "INHERENT AUTHORITY" TO ACT IN VIOLATION OF EITHER THE PROHIBITION AGAINST BILLS OF PAINS AND PENALTY, OR THE RESTRICTION IN 50 U.S.C. §1701(B), OR 21 U.S.C. §881(A)(6).

This Court has stated,

> [W]e can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of Thou shalt nots' which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments. *Reid v. Covert*, 77 S.Ct. at 1226.

In short, the **prohibition** of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive. *Thompson v. Utah*, 18 S.Ct. 620 at 621-622, 170 U.S. 343, 42 L.Ed. 1061 (1898).

As this Court has stated,

> [t]he Constitution divides the National Government into three branches-Legislative, Executive, and Judicial. This `separation of powers' was obviously not instituted with the idea that it would

promote efficiency. It was, on the contrary, looked to as a bulwark against tyranny. For if governmental power is fractionalized, if a given policy can only be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will. James Madison wrote:

> 'The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.' *U.S. v. Brown*, 85 S.Ct. at 1712.

Even during time of war, this Court has recognized that these **prohibitions** in the Constitution must be observed.

As stated in *Ex Parte Milligan*, 4 Wallace 2 at 120, 18 L.Ed. 281 (1866),

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all time, under all circumstances. No doctrine, involving more pernicious consequence, was ever invented by wit of man than that any of its provisions can be

suspended by any of the great exigencies of government.

Even when Executive Branch acts under the,

> ...plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations-a power which does not require as a basis for its exercise an act of Congress, **but which of course, like every other power, must be exercise in subordination to the applicable provisions of the Constitution.** *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304, 57 S.Ct. 216 at 221, 81 L.Ed. 255 (1936).

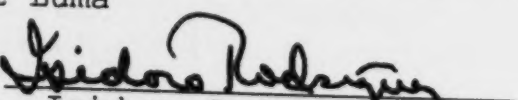
Thus the Executive Branch has no "inherent authority" to act contrary to the **prohibitions** in the Constitution, nor "inherent authority" to act in violation of the mandate in 50 U.S.C. §1701(b), and 21 U.S.C. §881 (a)(6).

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to the Court of Appeals for the District of Colombia, so to resolve these important federal questions.

Respectfully submitted,

Cooperativa Multiactiva de Empleados de Distribuidores de Drogas, Messrs. Julio Cesar Munoz Cortes, Nohora Paredes Gonzalez, Ricardo Javier Diaz Fajardo, Miguel Esteban Pineros Leon, and Jose Tiberio Fernandez Luma

By: 

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 8 Cl. 3, provide:

[Congress shall have the Power] To regulate Commerce....

Article I, § 9 Cl. 3, provide:

No Bill of Attainder or *ex post facto* Law shall be passed.

50 U.S.C. § 1701, provide:

Unusual and extraordinary threat; declaration of national emergency; exercise of Presidential authorities

(a)Any authority granted to the President by section 1702 may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.

(b)The authorities granted to the President by section 1702 may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared for purposes of this title and may not be exercised for any other purpose....

50 U.S.C. § 1705, provide:

(a) A civil penalty of not to exceed $10,000 may be imposed on any person who violates any license, order, or regulation issued under this title.
(b) Whoever will fully violates any license, order, or regulation of this title shall, upon conviction, be fined not more than $50,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both.

21 U.S.C. Sec. 881(a)(6), provide:
(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this sub-chapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this sub-chapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by the owner to have been committed or omitted without the knowledge or consent of that owner.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLOMBIA CIRCUIT

No. 99-5190

Cooperativa Multiactiva de Empleados de Distribuidores de Drogas, et al.,
Appellants

v.

R. Richard Newcomb, et al.,
Appellees

Appeal from the United States District Court for the District of Colombia (no. 98-CV0949(LFO))

Before: Ginsburg, Sentelle, and Henderson, *Circuit Judge*

JUDGEMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. The court is satisfied that appropriate disposition of this case does not call for published opinion. *See* D.C. Cir. Rule 36(b). It is

ORDERED AND ADJUDGED that the district's order entered on March 30, 1999 be affirmed. The appellants are foreign nationals and entities without any connection to the United States; they therefore lack standing to bring a challenge under Article I, Section 9, clause 3 of the Constitution of the United States. *See People's Mojahedin Organization v. Dept of State*, 182 F. 3d 17, 22 (D.C. Cir. 1999)("A foreign entity without property or presence in this country has no constitutional right, under due process clause or otherwise"). Because they have not presented any argument or evidence indicating that the Government violated 21 U.S.C. § 881 or 50 U.S.C. §§ 1701 & 1705, the appellants' statutory challenges fail as well.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41.

Per curiam
FOR THE COURT
Mark J. Langer, Clerk
/S/

By:
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLOMBIA

Civil Action No. 98-0949-LFO

COOPERATIVA MULTIACTIVA DE EMPLEADOS DE DISTRIBUIDORES DE DROGAS "COOPSERVIR LTDA.," *et al.*,

Plaintiffs,

v.

R. RICHARD NEWCOMB, in his official capacity as Director of the Office of Foreign Assets Control, *et al.*,

Defendants.

MEMORANDUM

On April 16, 1998, plaintiffs, a chain of Colombian drugstore cooperatives ("Coopservir") and individual members of its board of directors, filed this suit against defendants Richard Newcomb, Director of the Office of Foreign Assets Control, and Robert Rubin, Secretary of the Department of the Treasury. They seek declaratory relief from an April 22, 1997 "Notice of Blocking" that prevented them from engaging in transactions with property subject to United States jurisdiction. Defendants have moved to dismiss the first amended complaint, or in the alternative for

summary judgement.[1] A hearing was held on January 6, 1999. For the reasons stated herein, defendants' motion will be granted.

The International Emergency Economic Powers Act ("IEEPA") delegates to the President authority to prohibit transactions by persons, or involving property, "subject to the jurisdiction of the United States" where there exists an "unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat." 50 U.S.C. § 1702(a)(1)(B), 1701(a). On October 21, 1995, President Clinton signed Executive Order 12978 ("Order"), which declared "a national emergency" based on the finding that "the actions of significant foreign narcotics traffickers centered in Colombia, and the unparalleled violence, corruption, and

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[1] Defendants initially moved to dismiss the original complaint. After briefing was completed, plaintiffs filed a first amended complaint. Defendants then sought, and were granted, leave to file a supplemental motion to dismiss, or in the alternative for summary judgment, which has been fully briefed.

harm that they cause in the United States and abroad, constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States...." Exec. Order No. 12,978, 60 Fed. Reg. 54,579 (1995) The Order blocked all property and interest in property "that are or hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons," of the four principal figures of the so-called Cali drug cartel, including Gilberto Rodriguez Orejuela and Meguel Angel Rodriguez Orejuela (Orejuela brothers").

The also blocked property and interest in property subject to United States jurisdiction of: "*foreign persons* determined by the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State", either "to play a significant role in international narcotics trafficking centered in Colombia" or to "materially assist in, or provide financial or technological support for or goods or services in support of, the narcotics trafficking activities of persons designated in or pursuant to this [O]rder"; or "*persons* determined by the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to be owned or controlled by, or to act for or on behalf of, persons designated in or pursuant to this [O]rd

er." *Id* (emphasis added,)[2] The Order further prohibited, *inter alia*, "any transaction or dealing by United States persons or within the United States in property or interests in property of the persons designated in or pursuant to this [O]rder...." *Id.* Regulations promulgated by the Department of the Treasury provide that persons or entities listed in the annex to Executive Order 12978 (the four principals of the Cali cartel), or those determined to meet one of the criteria set out in the Order, will be labeled specially designated narcotics traffickers ("designated traffickers"). 31 C.F.R. § 536.312 (1997).

In October 1995, defendants named as a designated trafficker Distribuidores de Drogas Lá Rebaja ("Drogas La Rebaja") a major Colombian drugstore chain that allegedly was owned and controlled by the Orejuela brothers. 60 Fed. Reg.

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[2] Defendant Rubin has delegated to the Department of the Treasury's Office of Foreign Assets Control, headed by defendant Newcomb, performance of "[a]ny action which the Secretary is authorized to take pursuant to Executive Order 12978 or any further executive orders relating to the national emergency declared in Executive Order 12978...." 31 C.F.R. § 536.802(1997).

54,582,54,582(1995). In July 1996, plaintiff Coopservir purchased Drogas La Rebaja in a transaction that called for Coopservir's workers to pay for the drugstore chain out of the cooperative's profits for a period of ten years.[3] In the aftermath of this transaction, Coopservir and the individual members of its board where determined to be designated traffickers because of their alleged connection to the Orejuela brothers and other designated traffickers. The designation was made in a "Notice of Blocking" ("Notice") published on April 22, 1997 in the Federal Register. 62 fed. Reg. 19500, 19501-02 (1997).

Plaintiffs' challenge to the Notice proceeds along two tracks. First, plaintiffs contend that the Notice violates the Administrative Procedures Act, 5 U.S.C. §§551-706, because it is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law. Second, they argue that the Notice is unconstitutional because it : 1) violates due process of law; 2) is a bill of attainder; 3) imposes an excess

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[3] Plaintiffs contend that Copservir's "business objective is to serve the savings and loan requirements" of its employees, who work in the drug stores of the former Drogas La Rebaja. Opp. At 6.

ive fine; and 40 violates the doctrine of separation of powers. Defendants have moved for dismissal, or in the alternative for summary judgement. Consistent with the principle that courts "ought not pass on questions of constitutionality...unless such adjudication is unavoidable," *New York Transit Authority v Beazer*, 440 U.S. 568, 582 (1979) (citation omitted)(alteration in original), statutory questions implicated by defendants' motion are addressed first.[4]

II.

The Administrative Procedures Act ("APA") prohibits, *inter alia*, agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). When testing administrative actions against this standard, courts

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[4] Administrative regulations afford designated traffickers an opportunity to seek reconsideration of their designation to the Director of the Office of Foreign Assets Control, 31 CFR § 501.807 (1999). However, since the regulations do not make such a request for reconsideration a *sine qua non* of a final agency determination, there is no exhaustion requirement, and jurisdiction therefore lies. *Darby v. Cisneros*, 509 U.S. 137, 154 (1993).

assess "whether the [agency's] decision was based upon consideration of the relevant factors and whether there has been a clear error of judgement." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). *See also Milena Ship Management Co. v. Newcom*, 995 f.2d 620, 623 (5th Cir. 1993)(in context of OFAC blocking notice, court inquires "whether the agency acted within its authority, adequately considered all the relevant factors, and provided a reasoned basis for its decision."). The deference accorded agency action arguably is enhanced where, as here the action involved "the conduct of foreign relations," which is "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Regan v. Wald*, 468 U.S. 222, 243 (1984)(citation omitted).

Against this backdrop, plaintiffs claim that the Notice of Blocking violates § 706 of the APA because the record lacks sufficient evidence to warrant their designation as traffickers. This argument is unavailing. Executive Order 12978, pursuant to which the Notice was issued, authorizes blocking notices against any person-defined as "an individual or entity"-determined "to be owned or controlled by, or to act for or on behalf of, persons designated in or pursuant to" the Order. 60 Fed. Reg. 54,579 (1995). Defendants reasonably

determined that plaintiffs satisfied this standard. Specifically, there is compelling evidence that plaintiff Coopservir owes a continuing financial obligation to Drogas La Rebaja-payment over ten years for the purchase of Drogas La Rebaja-which itself has been listed previously as a designated trafficker, *see* 60 Fed. Reg. 54,582(1995), and has been determined to be owned or controlled by the Orejuela brothers, who were designated in the original Executive Order. 60 Fed. Reg. 54,579 (1995). *See* Administrative Record ("AR") Tab 13B (confirming Coopservir's purchase of Drogas La Rebaja). *See also* AR Tab 13G, I(private accounting firm reports documenting that Coopservir is owned by, *inter alia*, Drogas La Rebaja). Moreover, there is documentary evidence that Coopservir was established as part of the Orejuela brothers' efforts to consolidate certain business ventures to "facilitate the fulfillment of legal, accounting and tax obligations," AR Tab13C, and that numerous persons in COPSERVIR's management either are or have been senior members of other Orejuela-controlled enterprises, including Drogas La Rebaja. AR Tab 130,E, T.

Record evidence also establish that defendants acted reasonably when they designated the individual plaintiffs as traffickers. First, all five individual plaintiffs are either members of Coopservir's board, *see* Am. Compl. ¶7, or

hold significant managerial position with the cooperative. Second, there is evidence indicating that at least four of the five individual plaintiffs have held, or continue to hold, overlapping managerial positions with other designated traffickers or Orejuela-controlled enterprises. For example, plaintiff Julio Cesar Munoz Cortes, Coopservir's manager, AR Tab 13G, has been, and may continue to be, a top deputy of the Orejuela brothers in various enterprises that have been designated traffickers, among them Drogas La Rebaja Barranquilla, an outlet of Drogas La Rebaja, Drogas Condor, and Blanco Pharma. *See* AR Tab 13, M, N, O. The same evidentiary basis exists for plaintiff Miguel Estaban Pineros Leon, Coopservir's legal representative, AR Tab 13G; in 1995, and apparently for the Orejuela brothers, Pineros Leon authored a report, before the incorporation of Coopservir, touting the advantages of forming cooperative for pharmaceutical and related products. *See* AR Tab 13E. Coopservir president Jose Tiberio Fernandes Luna, moreover, is identified as both a board member and second assistant manager of Blanco Pharma, another designated trafficker. *See* AR Tab 13M, N. Similarly, plaintiff Ricardo Javier Diaz Fajardo, who is Coopservir's vice president, is identified as, *inter alia*, as the second assistant manager of Drogas Condor, also a designated trafficker. *See* AR Tab 13M. *See also id.* 13N. Finally, plain

tiff Nohora Paredes Gonzalez is a member of Coopservir's council, or its board of directors. AR Tab 13T. In view of the foregoing, the administrative record contains sufficient evidence to support a reasonable determination that Coopservir and the individual plaintiffs are "owned or controlled by, or ... act for or on behalf of," enterprises that are designated traffickers. 60 Fed. Reg. 54,579(1995). The Notice of Blocking is neither arbitrary and capricious, an abuse of discretion, nor a violation of law. Accordingly, defendants are entitled to summary judgment on this claim.

III.

In their first constitutional claim, plaintiffs contend that the Notice of Blocking subjects them to deprivation of "life, liberty, or property, without due process of law."[5] U.S. Const. Amend V. Defendants move to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Civ. P 12(b)(6). As an initial mat

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[5] At the January 6 hearing, counsel disavowed the due process argument: "We're not saying the Bill of Right applies." Trans at 33. However, because this claim is in the complaint and the opposition to defendants' motion, it is addressed herein.

ter, they question whether the Due Process Clause applies to plaintiff, who "appear to be nationals of Colombia not present in the United States." Mot to Dismiss at 38. Assuming, *arguendo*, that due process safeguards apply, defendants argue that plaintiffs have not shown that a life, liberty, or property interest has been affected. They further argue that in any event plaintiffs were afforded adequate process to challenge their classification as designated traffickers. *See* 31 C.F.R. § 501.807(a),(d) (1999)(designated traffickers "may seek administrative reconsideration"of their designation, and "may submit arguments or evidence that the person believes establish that insufficient basis exists for the designation."). In response, plaintiff asserts that Fifth Amendment protections apply to all persons, including non-resident aliens, and conclude without detailed explanation that their rights to due process have been violated. This is insufficient to state a claim upon which relief can be granted.

No directly dispositive authority governs whether Fifth Amendment protections apply to non-resident aliens.[6] In

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[6] It is, of course, well-settled that Fifth Amendment protections apply to resident aliens, *Mathews v. Diaz*, 426 U.S. 67, 77-78 (1976).

United States v. Verdugo-Urquidez, 494 U.S. 259(1990), for example, the Supreme court held that the fourth Amendment does not apply to non-resident aliens, and described its opinion in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), as similarly "rejecti[ng]...extraterritorial application of the Fifth Amendment." 494 U.S. at 269. *See also Cuban Am. Bar Ass'n v. Christopher*, 43 F.3d 1412, 1428-29 (11th Cir. 1995)(Holding that Cuban and Haitian migrants provided safe haven at American base in Cuba had no Fifth Amendment rights). The Court's sweeping gloss on *Eisentrager*, however, is belied somewhat by its tangential holding that "the Constitution does not confer a right to personal security or immunity from military trial and punishment upon an alien enemy in the hostile service of a government at war with the United States." 339 nU.S. at 785. *See Verdugo-Urquidez*, 494 U.s. at 290 (Brennan, J., dissenting)(majority "mischaracterizes" *Eisnetrager*, which held that German nationals could not obtain writs of habeas corpus "not because they were foreign nationals, but because they were enemy soldiers"). The *Eisentrager* gloss also is undercut to some extent by the Court's use in *Verdugo-Urquidez* of a case-by-case analysis that, for purposes of determining the applicability of constitutional provisions, assess whether an alien has "developed substantial connections with this country." 494

U.S. at 271.[7] There appears to be not authoritative resolution, therefore, of whether Fifth Amendment protections apply to the non-resident alien plaintiffs.[8]

This issue need not be decided, because, even assuming that Fifth Amendment protection apply to non-resident aliens, plaintiff have not demonstrated "substantial connections with this country." *Id.* In fact, counsel conceded at the Janauary 6 hearing that the record contains no evidence of any business or social connection between plaintiffs and the United States: "I will stipulate that I believe that none of my Colombian nationals have [sic] any nexas to the United States." Trans. At 33. *See also id.* At 30. Nor have plaintiffs shown

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[7] The majority opinion in *Verdugo-Urquidez* commanded only four votes, thereby reducing its gloss on *Eisentrager* to that of any other dictum.

[8] This is not true for the Fifth Amendment's right against self-incrimination. *See Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring)(right would apply to anyone prosecuted in an Article III court). *See also Wang v. Reno*, 81 F.3d 808, 816-18 (9th Cir. 1996).

that they have been deprived of "life, liberty, or property." They have not claimed, for example, that they have been imprisoned because of the Notice of Blocking, or that they have been prevented from engaging in a particular transaction or have been denied access to a specific business or social channel. Plaintiffs generalized assertion that their Fifth Amendment rights have been violated is not focused on any particular deprivation. Nor have plaintiffs argued that the administrative provisions that permit a designated trafficker to seek reconsideration of a designation, *see* 31 C.F.R. §501.807(a), (d), afford constitutionally inadequate process for a hypothetical deprivation. Without such allegation, plaintiffs' claim cannot survive defendants' motion to dismiss.

IV.

Plaintiffs next contend that the Notice of Blocking is an unconstitutional bill of attainder. U.S. Const. Art I §9, cl. 3. To establish this claim, plaintiff must show that the Notice is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protection of a judicial trial." *Selective Serv. Sys. V. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 846-47 (1984)(quoting *Nixon v. Administrator of General Ser*

vs., 433 U.S. 425, 468 (1977)).[9] Defendants concede that there was no judicial trial, but argue that the Notice is not "a legislative activity subject to the provisions" of the Bill of Attainder Claus, Supp. Mot. To Dismiss at 5, that it does not improperly single out an identifiable individual, and does not inflict constitutionally proscribed punishment.

As an initial matter, there is no apparently authoritative case law holding that the prohibition against bill of attainder applies to actions of the executive branch. Justice Black's opinion in *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123 (1951), that "I cannot believe ... that the authors of the Constitution, who outlawed the bill of attainder, inadvertentlyendowed the executive with the power to engage in the same tyrannical practices that had made the bill such an odious institution, *Id* at 144 (Black, J. concurring), was conspicuously not the opinion of the Court. *Cf. United States v. Brown*, 381 U.S. 437, 442 (1965)(bar against bills of attainder is "an implementation of

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[9] They also must show that they, as nonresident aliens, are entitled to constitutional protections. *See supra* III.

the separation of power"). In addition, several courts of appeal have held that the constitutional bar applies to legislative acts. *See, e.g. Walmer v.Depart ment of Defense*, 52 F.3d 851, 855 (10th Cir. 1995); *Marshall v. Sawyer*, 365 f.2d 105, 111 (9th Cir. 1966). However, it is unnecessary to decide whether an executive action can be an impermissible bill of attainder. Even if the action were legislative, it would not constitute a bill of attainder.

In *BellSouth Corporation v. FCC*, 144 f.3d 58 (D.C. Cir. 1998), our court of appeals wrote that the constitutional bar against bill of attainder is triggered when an action "meets two tests--first, that it apply with specificity, and second, that it impose punishment." *Id.* At 62. According to the court's analysis in *BellSouth*, the Notice of Blocking satisfies the specificity criterion because it identifies plaintiff by name. *Id.* At 63.[10] The Notice does not,

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[10] Defendants argue that the Notice fails the specificity requirement because it does not single out plaintiffs "entirely by irreversible acts." *Selective Service Sys.*, 468 U.S. at 848. They cite, for example, *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866), where the Supreme court invalidated a provision of Missouri's

however, subject plaintiffs to improper punishment. First, it does not impose punishment "traditionally judged to be prohibited by the bill of Attainder Clause," such as death, imprisonment, banishment, punitive confiscation of property, or bars specific employment of profession. *Nixon*, 433 U.S. at 473-75. Second, the Notice "reasonably can be said to further nonpunitive legislative purpose," *id.* at 475-76, namely protection of national interests by "stemming the penetration of illicit drug profits into legitimate sectors of the Colombian economy by member of the Cali Cartel." Supp. Mot. At 12. *See Bellsouth*, 144 F3d at 65 (characterizing this factor "as the most important"). Finally,

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post-Civil War Constitution that barred persons from various professions if they "could not truthfully sear that they had been loyal to the Union during the war." *BellSouth Corp. v. FCC*, 144 F.3d 58, 62 (D.C. Cir. 1998). Defendants contend that, pursuant to this reasoning, the Notice of Blocking is not impermissibly specific because it identifies plaintiffs largely on the basis of *reversible acts that they are continuing to commit* - namely, acts that maintain their connections with the Orejuela brothers and other designated traffickers. This argument is foreclosed by our court of appeals' decision in *BellSout*. *Id.* at 63.

plaintiffs have presented no evidence-let alone "unmistakable evidence," *id.* at 67 (citation omitted)- of a "congressional [or executive] intent to punish" them. They contend that they have been branded with "a badge of infamy," supp. Opp at 7, but they proffer no evidence from the record supporting IEEPA, Executive Order 12978, or the Notice of Blocking that suggests that they have been labeled designated traffickers for any reason but to curb activities considered to be harmful to national interests. *See BellSouth*, 144 F.3d at 67. In view of the foregoing, plaintiffs hav enot shown that the Notice of Blocking is an unconstitutional bill of attainder, and thus as a matter of law defendants are entitled to summary judgement on this claim.

V.

Plaintiffs next claim that the Notice of Blocking violates the Eighth Amendment's prohibition against excessive fines. This contention cannot survive the motion for summary judgement. First, plaintiffs have not shown that they have been subject to a "fine" that can be characterized as constitutionally excessive. There isw no evidence, and plaintiff have not suggested, that the Notice of Blocking forces them to make "a *payment* to a sovereign as punishment for some offense," *United States v. Bajakajian*, 118 S.Ct. 2028,

2033 (1998)(quoting *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)(emphasis added), or that the alleged "fine" is "grossly disproportional to the gravity" of their alleged offense. *Id.* at 2036.

Second, plaintiffs have not argued convincingly that the Supreme court's decision in *Austin v. United States*, 509 U.S. 602 (1993), renders the Notice unconstitutional. Plaintiffs rely heavily on the court's holding in *Austin* that the Excessive Fines Claus applies to forfeiture of the plaintiff's auto body shop and mobile home because the forfeiture was intended, at least in part, as punishment for an underlying drug offense. *Id.* at 622. Yet plaintiffs do not present a principled argument for equating a notice that blocks certain transactions with an actual forfeiture that exact a payment accruing to the government. Even were they able to do so, however, plaintiffs still have not demonstrated that such a payment, without more, necessarily is an unconstitutional excessive fine. Accordingly, defendants' motion for summary judgement on this claim will be granted.

VI.

Finally, plaintiffs argue that the Notice of Blocking violates the doctrine of separation of powers. The first

prong of this claim contends that the Notice of Blocking infringes upon Congress' prerogative to regulate international commerce and the judiciary's authority to adjudicate guilt. Compl. At 15-16. This is not persuasive. The Notice of Blocking implemented an Executive Order that was issued Pursuant to an explicit grant of authority in the International Emergency Economic Powers Act ("IEEPA"). *See* 50 U.S.C. §1701(a). *Cf. Dames & Moore v. Regan*, 453 U.S. 654, 672 (1981)(IEEPA confers "broad authority" on the executive "when acting under this congressional grant of power"). Moreover, the Notice does not adjudicate plaintiffs guilty of any criminal or civil offenses, and therefore does not invade the province of the judiciary.

Plaintiffs next contend, however, that the Notice violates separation of power principles because it does not comply with the federal statute governing forfeiture, 21 U.S.C. § 881. This argument does not revive the separation of powers claim. As was the case with the argument that the Notice is an unconstitutionally excessive fine, *see supra V*, plaintiffs have not substantiated their claim that a blocking notice, which bars transactions but does not confiscate property, is tantamount to a

forfeiture.[11] *See Tram Qui Than v. Regan*, 658 F.2d 1296, 1304 (9th Cir. 1981) ("Vesting occurs when title to assets is transferred to the government; blocking does not transfer title but rather prohibits temporarily, transaction involving those assets."). They have not even alleged that they have been divested of legal title in property interests, or that such title has been transferred to the United States government. *See* 21 U.S.C. §881(h)(West Supp. 1998) (forfeiture vests "right, title, and interest in property...in the United States"); *see also United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 126 (1993). Having failed to establish this critical facet of their argument, plaintiffs cannot show that defendants are required to comply with forfeiture statutes, 21 U.S.C. § 881, when issuing a blocking notice. Defendants' motion for summary judgement on the separation of powers claim therefore will be granted.

As accompanying Order implements the decision announced herein.

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[11] Having failed to demonstrate that a blocking notice effects an actual forfeiture, plaintiffs cannot show that it effects a "forfeiture of estate" or "corruption of blood." *See Bigelow v Forrest*, 76 U.S. (9 Wall) 339, 350 (1869).

Dated: March 29, 1999

Louis F. Oberdprfer
/S/
United States District Judge